Nos. 93-474, 93-744

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Petitioner,

—v.—

MAHER TERMINALS, INC.,

Respondent/Cross-Petitioner,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT/CROSS-PETITIONER IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

Petitioners, Pasqualina Santoro, and the Solicitor General of the United States on behalf of the Director, Office of Workers' Compensation Programs ("OWCP"), seek review of the April 19, 1993 decision of the United States Court of Appeals for the Third Circuit vacating an Administrative Law Judge's award of benefits for Mrs. Santoro's late husband's medical expenses, disability and death pursuant to Sections 907, 908, 909 [Sections 7, 8 and 9] of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Sections 901, *et seq.* [1972], and remanding for further proceedings. The ALJ, by decision and order dated November 22, 1988 following hearing provided by Longshore Act Section 19(d), which ". . . shall be conducted in accordance with Section 554 of Title 5 of the United States Code [the Administrative Procedures Act, 5 U.S.C., Section 551, *et seq.*]" (Pub. L. 92-576 (1972)), awarded benefits after review of the conflicting evidence on the issue of "causality" between Mrs. Santoro's husband's injury at work for respondent, Maher Terminals, Inc. on July 23, 1985 and his death March 11, 1986, due to "cardiac arrest" as "a consequence of . . . cervical astrocytoma" (A-29)[1]. The factfinder did not, however, decide whether or not injury at work, on account of which compensation for temporary total disability pursuant to the Act's Section 8(b) had been paid, had, in fact, contributed to the harm to Mrs. Santoro for which benefits were sought, as a result of her late husband's disability after he returned to work August 1, 1985 and his allegedly hastened death. Instead, the Administrative Law Judge rejected respondent's evidence denying causal connection between employment and disability and death caused by cancer, not as incredible or inaccurate, but because ". . . inconsistent with the purposes and policy of the

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[1] References preceded by "A" identify Appendix pages in Mrs. Santoro's petition (93-474). Those followed by "a" are found in the petition of the Director, OWCP, United States Department of Labor (93-744). References followed by "AM" are to pages in the Appendix to this Brief.

[Longshore] Act" (A-44). Not having weighed respondent's proof in relation to Mrs. Santoro's evidence, the Administrative Law Judge held nonetheless: "The issue of causality is still deemed debateable, but the doubt is resolved in favor of the Claimant" (A-44). As a result of applying what petitioners describe as the "true doubt rule", the ALJ ". . . found and concluded that . . . disability and death is causally related to . . . [the] . . . accident on July 23, 1985" (*Ibid*). In his December 15, 1988 "ruling" denying respondent's petition for reconsideration, the Longshore Act factfinder observed ". . . the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of the Administrative Procedures Act and the views expressed by the Benefits Review Board in *Betz v. Arthur Snowden Company*, 14 BRBS 805 (1981)" (A-46).

By decision March 27, 1992 the Benefits Review Board, empowered to hear and determine appeals ". . . based upon the hearing record . . ." pursuant to Longshore Act Section 21(b)(3), affirmed, determining that the award was ". . . supported by the substantial evidence in the record considered as a whole", a decision from which respondent appealed to the Court of Appeals for the Third Circuit as provided by the Act's Section 21(c). In an opinion filed April 19, 1993 (992 F.2d 1277) that court reversed, holding that Mrs. Santoro was required—the Longshore Act Section 20(a) presumption ". . . [t]hat the claim comes within the provisions of this chapter . . ." having been rebutted and there being no issue of right to benefits dependent upon respondent establishing an affirmative defense—to prove her entitlement by the preponderance of the evidence.

The court of appeals considered the issues in two parts: whether the Administrative Procedures Act "prohibits the application of the true doubt rule" because it establishes a standard of proof by the preponderance—something different from whether the same standard existed prior to Procedures Act adoption—and whether the APA also required that this

burden in Mrs. Santoro's case be allocated to the benefits claimant. In rejecting application of a rule of doubt in Longshore Act benefits claim factfinding, the court of appeals held that because the Longshore Act Section 19(d) incorporates the APA, Section 556(d), i.e., the Administrative Procedures Act Section 7(c), controlled. It interpreted *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) as holding that the first sentence of the Section 556(d), which provides: "Except as otherwise provided by statute, the proponent of a rule of order has the burden of proof", refers only to the burden of production. But it also decided that *Steadman v. SEC*, 450 U.S. 91 (1981) held that the third sentence of Section 7(c): "A sanction may not be imposed or ruled or order issued except . . . [when] . . . supported by and in accordance with the reliable, probative, and substantial evidence" established a "standard of proof" by the "preponderance of the evidence". With respect to who should bear the burden of persuasion and, with that, the risk of decisional error, the court of appeals concluded that the only interpretation of the first and third Section 7(c) sentences which would not ". . . contravene the statute or suggest an impossibility is one which allocates the burden of persuasion to the proponent of the order, i.e., the party initiating the proceeding, on the issues raised by that party, but allows the burden to be shifted . . . as to issues raised by the opponent, i.e., affirmative defenses." So holding, the court of appeals remanded since "[I]t is not clear if the ALJ . . . ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard".

STATEMENT OF JURISDICTION

On September 23, 1993 petitioner Santoro filed a timely petition for writ of certiorari seeking restoration of her award of benefits. On October 22, 1993 respondent filed a cross-petition asking in the event Mrs. Santoro's petition was granted for a writ in order to have this Court review the appropriateness of the order of remand. On November 10,

1993 the Solicitor General filed a petition on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor seeking review of the decision of the Third Circuit Court of Appeals in Mrs. Santoro's case and in *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, decided by the same court March 23, 1993, which is said to involve issue of the alleged "true doubt rule" in claims brought under the Black Lung Benefits Act, 30 U.S.C. Section 901, *et seq*. The Court has jurisdiction pursuant to 28 U.S.C., Section 1254(1).

SUMMARY OF ARGUMENT

Mrs. Santoro's case is presented by the court of appeals' analysis and petitioners' argument as involving issue of whether Longshore Act decisional law prior to APA enactment[2], which allegedly allocated the burden of persuasion on all entitlement issues to the employer, controls with the claimed result that the true doubt ruled is valid, or but for the APA would be valid; or, instead, as the court of appeals' opinion might be read as suggesting but does not hold, adoption of the Procedures Act altered existing law by imposing a burden of persuasion by the preponderance of the evidence upon the benefits claimant. The Solicitor acknowledges (Pet., pp. 21-22) that the standard of proof on every Longshore Act benefits claim issue *is* the preponderance, but asserts that what is said to be the traditional allocation of the risk of non-persuasion was improperly disturbed because the court of appeals' interpretation of the Procedures Act reveals an "ambiguity . . ." which is "best accommodated, not . . . by placing the risk of non-persuasion always on the party seeking to change . . . the *status quo* . . . , but by allowing the Agency to determine . . . which party should bear that risk . . ." (Pet., p. 22). The Solicitor thus describes the doubt rule as involving nothing more than allocation of the risk of non-

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[2] Act of June 11, 1946, c. 324, 60 Stat. 237.

persuasion; and for this reason it can be applied *only when* the conflicting evidence has been determined to be of identical perceived credibility and accuracy. The government justifies the Agency's alleged right to make the allocation because ". . . the principle that doubts are resolved in favor of the claimant was firmly established as a rule of construction under the . . . [Longshore Act] . . . when the . . . [Administrative Procedures Act] . . . was enacted (Pet., p. 23); and that "the 'true doubt rule' represents, in effect, the Secretary's administrative judgment, developed in conjunction with and long accepted by the courts that . . . [the] . . . risk [of non-persuasion] should rest on the employer" (Pet., p. 16). By arguing "deference" the government claims that the Secretary of Labor has the right to transfer the burden of persuasion to the employer on every entitlement issue in the event the courts have not done so, despite the fact that there is no evidence that the Agency ever believed itself so empowered. In no Longshore Act regulation is provision made for a rule of doubt in administrative law judge determinations of fact despite the Act's Section 23(b). See, 20 CFR Part 702.

The "true doubt rule", which both petitioners misdescribe, does *not* merely reallocate the risk of non-persuasion, it creates a standard of proof applicable to evidence presented by the claimant which is not only less than by the preponderance it is so much less that the risk of failure to abolish "any" doubt on all issues belongs to the employer. Nonetheless, both petitioners claim that evidentiary "equipoise", or that the proof supporting or opposing entitlement to benefits be found "equally probative" or "evenly balanced", is required before the rule may be applied. This supposed threshold of doubt rule applicability is, however, not found in the decisions of the courts of appeals and by the Benefits Review Board; and in no case is the rule's use rejected because the only allegedly required determination was not made by the finder of fact. The rule, which petitioner Santoro claims ". . . is not an affirmative rule of evidence or procedure but is a deadlock

breaking device" which is "within the discretion of the fact finder" to employ (Pet. p. 7), since admittedly not a principle of required application, *cannot* be law. The government's effort to justify the rule by describing it as a mere reallocation device applicable after weighing in the event conflicting evidence is found to be in "equipoise"—considered in light of what in *Maher Terminals, Inc.* and *Greenwich Collieries v. Director, OWCP* were the actual bases of the awards of benefits—establishes that the Agency's argument, which in any event is not an interpretation of any Longshore Act provision, is a *post hoc* rationalization entitled to no deference. *Martin v. OSHRC*, ___ U.S. ___, 111 S.Ct. 1171, 1179 (1991).

That there is any "doubt rule" applicable to Longshore Act benefit claim finding of fact is rejected by this Court's precedent. Most fundamentally, since the true doubt rule lessens the standard of proof below the preponderance of the evidence as the court of appeals held (992 F.2d at 1285), it contradicts not only the Administrative Procedures Act but this Court's "substantial evidence" definition as well. In *Steadman v. SEC*, *supra*, this Court observed (450 U.S. at 99) that Section 7(c) "in accordance with" meant "not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury", which as the Court said is substantial evidence as defined in *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939). It did so in holding that the Procedures Act established a standard of proof *less than* applicable decisional law provided before APA enactment. As this Court also held (450 U.S. at 100 n.20), because ". . . the reviewing court is not to weigh the evidence . . .", the "functions of initial decisionmaking and judicial review of it" are "different", for which it cited *Charlton v. FTC*, 543 F.2d 903 at 907 (D.C. Cir. 1976), a case which holds: "Nowhere in our jurisprudence [i.e., *in American law*] have we discerned acceptance of a standard of proof tolerating something less than the weight of the evidence". In

Steadman the Court held further (*Ibid.* at 99): "Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of [adjudicative] error". It thus appears that the true *Steadman* holding is "not simply" that Administrative Law Judge's findings of fact had to be made pursuant to what *NLRB v. Columbian Enameling and Stamping Co.* required prior to APA enactment, but that, as a result of enactment of the APA, findings of fact must *always* be made, in absence of contrary provision in the authorizing statute, by the ALJ on the basis of what he or she deems to be the preponderant evidence. In sum, *Steadman v. SEC* need not be read as holding that the Procedures Act *created* the preponderance standard; and that it had not existed before its adoption. What *Steadman v. SEC*, *supra*, however, unquestionably holds, as a result of this Court's rejection of the dissenting view, that the APA should not alter existing standards established by decisional law before that enactment, is that, were there a doubt rule in Longshore Act factual determinations prior to adoption of the Procedures Act in 1946 as petitioners mistakenly claim, the APA abolished it.

The origin of a rule of doubt has also been inaccurately described by petitioners, since no such rule was *ever* applied to Longshore Act factfinding prior to 1968, more than 40 years after the Act's adoption[3]. Moreover, the rule cannot be valid unless factfinder doubt, itself, is substantial evidence, in which event Section 21 review becomes a matter whether it can be determined that the ALJ "properly considered" the conflicting evidence before awarding benefits, not by actually deciding the factual issues upon which entitlement to benefits depends, but after determining that "there is a significant basis for true doubt" that benefits should be denied.

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[3] March 4, 1927, c.509, 44 Stat. 1424.

STATEMENT PURSUANT TO RULE 15 OF PERCEIVED MISSTATEMENTS OF FACT AND LAW

Both petitions urge validity of the "true doubt rule" because "[f]or fifty years or more" (Solicitor's Pet., p. 14) part of Longshore Act law. This alleged rule, which is concededly based upon the statute's "humanitarian" purpose or "policy" of "liberal" administration as opposed to any Longshore Act provision, applies in the event that the evidence is "equally probative" or is in "equipoise" on any and all "doubtful factual issues" (Santoro Pet., p. 6); or on ". . . those factual questions in which the evidence is found to be in equipoise" according to the Solicitor General (Pet., p. 15). Neither Mrs. Santoro nor the Solicitor clearly identifies what, if any, finding, other than that the factfinder is not convinced that benefits are *not* owed, is required before an Administrative Law Judge only *may* apply the "true doubt rule", i.e., whether a predicate determination that the conflicting evidence *is* of identical credibility and perceived accuracy must be made; or whether it is properly employed even when there is only doubt that benefits should be denied. Evidentiary "equipoise" with respect to each essential fact and a rule of doubt applied to all factual issues arising from contravention is not only meaningless, it cannot be reconciled with the reality that determinations from conflicting evidence are never doubt-free, as well as the fact that any standard of proof allocates the risk of decisional error (*Addington v. Texas*, 441 U.S. 418, 423 (1979)). In "equipoise" and "equally probative" are, moreover, ambiguous. For this reason, it is not sufficient for the Solicitor to claim that "the rule provides only that when the adjudicator finds the evidence on each side evenly balanced (taking account of both its quantity and its quality), the doubt finally remaining should be resolved in favor of the claimant" (Pet., p. 15). It as well as the assertion: "In the Secretary's view, an Administrative Law Judge should find the evidence evenly balanced only in narrow circumstances, after carefully considering all the evidence and exhausting all

methods of evaluating it" (*Ibid.*, p. 15) do not dispel uncertainty, they add it. It is not apparent what the Solicitor intends by the alleged requirement that the factfinder "take[ ] account of the quantity and quality of evidence". Similarly unclear is what an ALJ need do before it can be said that he or she "carefully consider[ed] all the evidence and exhaust[ed] all methods of evaluating it"? And what do petitioners intend "in equipoise", "equally probative" or "evenly balanced" actually mean? No answer is provided by the Solicitor's claim that the "rule provides that when evidence submitted by the claimant and the party opposing the award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant" (Pet., p. 4); or, contradictorily, since doubt is possible even when the conflicting evidence is thought to be of vastly disparate weight favoring denial of benefits when "weight" means credibility and accuracy, by quoting this Court's doubt rule description (*Mullins Coal v. Director, OWCP*, 484 U.S. 135, 144 n.12 (1987)), asserting that ". . . where true doubt exists, that doubt shall be resolved in favor of the claimant" (Pet. p. 25).

Use of the "true doubt rule" is affirmed by the Benefits Review Board in absence of any predicate finding which might be said to constitute a declaration of evidentiary "equipoise"; or demonstration even that the conflicting evidence has, in fact, been weighed for comparison of relative credibility or accuracy. APA Section 557(c)(3) to which neither petitioner refers, however, provides: "All decisions . . . shall include a statement of—(A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record". The Board's decision in *Betz v. Arthur Snowden*, 14 BRBS 805 (1981), which according to the Solicitor establishes procedural safeguards which make "the 'true doubt rule'. . . plainly permissible" (Pet., pps. 15-16), does *not* require a finding that the conflicting evidence is of equal credibility and perceived accuracy before the doubt rule may be applied.

The rule, instead, applies to any and all doubts as the Benefits Review Board held (A-21). See, e.g., *Avondale Shipyards v. Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1st Cir. 1978). Despite petitioners' description, the doubt rule in longshore cases has been said to apply in determining whether or not the Longshore Act Section 20(a) presumption, ". . . that the claim comes within the provisions of this chapter", has been rebutted and, hence, before evidentiary equipoise is possible. *Hensley v. Wash. Metro Area Transit Authority*, 655 F.2d 264, 267, 268 (D.C. Cir. 1981); *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). It has been further held that it need not be employed when the issue of entitlement to benefits is "close". *Sprague v. Director, OWCP*, 688 F.2d 886 (1st Cir. 1982). On the other hand, Longshore Act benefits have been awarded as a result of the doubt rule in absence of evidence which would meet the test of relevance defined in F.R.Evid. 401 as ". . . having any tendency to make the existence of a fact . . . more probable or less probable", i.e., when the evidence supporting compensability was only that a connection between employment and disability for which benefits were sought was "possible". *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986); *Mid-Gulf Stevedores, Inc. v. Neuman*, 462 F.2d 185 (5th Cir. 1972). Contrary to petitioners' description, the "true doubt rule", in fact, allows evidence which would not be admissible in any case tried to a jury to be the basis of an award of benefits; or, when claimant and the employer offer conflicting relevant proof, it dispenses with requirement that such evidence be weighed. Although neither petitioner says so, these two applications of the actual rule are reflected in the initial decisions in the cases subject to the Solicitor's petition; and Benefits Review Board's affirmance of both demonstrates that the rule cannot be reconciled with the petitioners' characterization of it, however vague. Instead, affirmance shows that the "true doubt rule" is actually an avoidance device which allows an ALJ to

award benefits without deciding the issues upon which the right to benefits depends. The "principle" which informs the actual rule is only that *no risk* benefits might be mistakenly denied should be tolerated.

Greenwich Collieries v. Director, OWCP

In the Black Lung Benefits Act case which the Solicitor would have this Court review, benefits were awarded after the evidence supporting compensability, on the basis of claim that there was X-ray evidence of the presence of pneumoconiosis, was found to be "significant enough to raise true doubt" (41a). Since as the Board acknowledged it cannot reweigh the evidence (18-19a), its affirmance establishes that the ALJ's finding means the same thing as the Board's determination that the factfinder had "properly discussed and weighed all relevant medical evidence" before finding conflicting readings of allegedly positive X-rays "equally probative" (20a). The award, however, does not reflect that this evidence was, in fact, weighed, since all the ALJ did was conclude that she was ". . . not impressed or persuaded by the fact that the employer was able to produce a greater number of negative interpretations" (41a). Thus, in the Board's view "probative" must mean "relevant" as defined in F.R.Evid. 401, since only judged by this standard is all evidence which can be said to be probative equally so. That this is so is apparent from the holding that the Administrative Law Judge did all that needed be done in deciding the issue of disability: The Board found that "her discussion of the medical evidence . . . supports . . . the inference that she had *properly considered* all the conflicting evidence" (22a, emphasis added). This means that an ALJ who in his or her discretion chooses to apply the rule need search only for some evidence in the record which if considered in isolation would support an award; but the factfinder need *not* actually either believe it or trust its accuracy, save, as will be shown, to the extent he or she decides it is not inherently incredible or patently unreasonable. In the

event the Benefits Review Board agrees that it is not, evidence "significant enough to raise true doubt" is substantial evidence supporting an award based upon a finding of doubt and not fact. Surely, the decision of the Benefits Review Board in *Greenwich Collieries v. Director, OWCP* establishes that as a result of the doubt rule it is proper for an ALJ to award benefits without conflicting evidence being found in "equipoise" after it has been exhaustively weighed, as the Solicitor has mistakenly suggested must be done before the rule may be invoked.

Maher Terminals, Inc. v. Director, OWCP

In Mrs. Santoro's case, although in denying rehearing the ALJ, unlike in *Greenwich Collieries v. Director, OWCP*, in fact, characterized the "conflicting evidence" as "equally probative" (A-46), he could not have weighed respondent's evidence which he rejected for reason of Longshore Act "policy". In addition, the basis for his award of benefits was doubt about an issue to which the parties *agreed*. The decision of the ALJ and the Benefits Review Board in Mrs. Santoro's case carries issue of the doubt rule in Longshore Act cases an additional step—doubt need not be a matter of evidence in the record and, instead, can arise in the mind of the factfinder despite agreement that doubt is baseless. Neither petitioner acknowledges that the Benefits Review Board recharacterized the ALJ's finding that the conflicting evidence had been "equally probative" as "in equipoise"; or that the Board also said without *any* basis that the Administrative Law Judge had found petitioner's expert's testimony "credible". For this reason, it determined that the witness' opinion, which was said correctly to have concerned only the effect of edema caused by trauma (1-7 AM)—which there is no evidence the Administrative Law Judge believed and which it is certain was *not* the basis of his award of benefits—required that it affirm. The Solicitor also affirmatively distorts the record in Mrs. Santoro's case—the government alleges that claimant's expert

testified that injury at work hastened disability and death "by aggravating a tumor that was previously dormant and might have remained so for years" (Pet., p. 9) despite the fact that this witness testified that pre-existing disease was an aggravating factor only because its presence supposedly made the effect of "edema" critical (6 AM). Moreover, the Solicitor (Pet., p. 10), as did the Benefits Review Board (A-23), claims the Administrative Law Judge "credited" the claimant's expert's opinion "anchored in his experience as a hands-on neurosurgeon", without acknowledging that the opinion was only that "Claimant (*sic*) sustained some type of traumatic insult to or around his neck of which he complained from the very beginning" (A-40).

In Mrs. Santoro's case the issue of "causality" between work related alleged whiplash injury (for which benefits had been paid until the day before deceased returned to work eight days after his injury) and subsequent disability and death from cancer of the cervical spinal cord was addressed at the Section 19(d) hearing by Bennett W. Derby, M.D., who testified for respondent, and by David I. Yazdan, M.D., a neurosurgeon who performed exploratory surgery on deceased August 19, 1985 and who testified as petitioner's medical witness. According to respondent's expert, deceased had astrocytoma for a "long, long time" before injury at work, a portion of which ". . . abruptly escalated, intrinsically, naturally, spontaneously, biologically in and of itself without reference to any external event into an accelerated much more malignant phase of growth which started literally breaking down the spinal cord and did so piece by piece" (A-39). The Administrative Law Judge rejected this evidence, not because of any lack of credibility or factfinder concern for accuracy, but on account of close temporal coincidence between occurrence of injury at work on July 23, 1985 and onset of catastrophic symptoms no later than August 15, 1985 (A-44). According to decedent's treating neurosurgeon's "edema theory" (A-37), upon which Mrs. Santoro relied exclusively to establish connection between her late husband's injury at

work and her entitlement to benefits, although deceased had preexisting astrocytoma, later disability and death did not result from progression of disease but, instead, were caused by swelling *within* the cord directly *caused by* injury at work. This "*edema*" was supposedly thereafter aggravated by ". . . the constant rubbing of the swollen spinal cord against the vertebral canal owing to . . . ordinary regular movement of his head [which] gradually increased the swelling" which "led to neurological breakdown and hastened his death" (A-35). An essential part of this witness' view of "causality" which respondent's expert said was "medically impossible" (A-32) was his testimony that deceased's astrocytoma—which his report of operation (12 AM) described as "quite thin and fluctuant" (indicating that deceased's tumor was highly malignant), had, instead, been ". . . slightly fluctuant, very firm and leathery in consistency" (A-35) (indicating to the contrary)—had *not* been "cancer" (8 AM). It was because this was supposedly so that petitioner's witness claimed that deceased "might have gone another 15 or 20 years before he would [have] become symptomatic" (A-42) but for edema caused by injury (A-23, 1 AM). Thus, deceased's doctor, in sponsoring an explanation for disability and death in which pre-existing disease was not the direct cause, denied that there *had been* any escalation in the degree of malignancy of deceased's tumor. He specifically testified that "the injury did not cause the tumor to grow" (1 AM) and that initial and subsequently increasing "edema" and/or its consequences did not ". . . make[ ] the tumor bigger or increase[ ] . . . cell growth or anything else" (3 AM). It was evidentiary agreement denying "causality" in the event escalation in level of malignancy had occurred; or testimony establishing it because of "edema" directly caused by injury without escalation occurring, which was described by the Administrative Law Judge as "equally probative". Neither petitioner has informed this Court that the award of benefits was *not* based upon the factfinder's inability to decide which opinion was the more credible or accurate.

The Administrative Law Judge did not sponsor the credibility of petitioner's witness "edema theory". In addition to finding, not that "the" testimony had been "inconsistent or contradictory" (A-44) but as the Benefits Review Board observed that petitioner's expert's had been (A-22), the ALJ held that ". . . there is some merit to the employer's position, taking into account the difference it pointed to in[. . . petitioner's doctor's] . . . testimony that, in effect, . . . [his] . . . opinion is a gratuitous 'theory' to put the claimant's case in the best light" (A-40). On the other hand the factfinder determined that respondent's expert's testimony provided a "high level of persuasion" on all issues other than whether deceased had sustained injury to his neck at work at all (A-40); but as he also noted, this witness testified in any event that deceased's astrocytoma "is not known to medical science to be caused or aggravated by trauma" (A-44). Also certain is that the ALJ could not have awarded benefits because the "issue of causality remains debateable" after having rejecting respondent's evidence had he concluded that petitioner's doctor's testimony *had been* credible and accurate; in that event the weight of the acceptable credible evidence would have preponderated in Mrs. Santoro's favor. In addition, the reason for ALJ doubt was identified and this required rejection of petitioner's witness' testimony that deceased's astrocytoma had not been cancer; and all but surely because whatever his hearing testimony he had described it as "malignant looking" in his report of operation (11 AM).

What the Administrative Law Judge doubted was not that there *had been* "abrupt escalation of the underlying astrocytoma" which the finder of fact accepted, but both experts' opinion that this could in no way be related to trauma. Despite agreement that trauma did not cause deceased's astrocytoma and did not "make[ ] the tumor bigger or increase[ ] cell growth or anything else. . .", the ALJ observed that "the type of the Claimant's (*sic*) underlying neoplasm poses one of the greatest difficulties in resolving the basic issue in this

case". This "difficulty" arose from the fact that "[i]t seems evident or reasonable to acknowledge that the causes and factors controlling malignancy are still obscure and under research"; and the Administrative Law Judge immediately thereafter observed that although respondent's witness "testified that the disease is not known . . . to be caused or aggravated by trauma", there nonetheless was ". . . nothing in this record to indicate whether any statistical studies have been done in this area" (A-44).

In suggesting that there was "evidentiary deadlock", petitioners fail to acknowledge that the impact of the "true doubt rule" in Longshore Act cases is best demonstrated by the fact that it is improper to base an award, where as in Mrs. Santoro's case the issue does not enable the factfinder to decide upon the common sense of the situation, or when the record is not conclusive on the issue of causation (see, *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741 (5th Cir. 1962)), on adoption of an explanation which expert medical testimony rejects. See, *Gober v. Matthews*, 574 F.2d 772, 777 (3rd Cir. 1978). For these reasons, had the Administrative Law Judge held affirmatively that injury at work *had* caused abrupt escalation in level of malignancy such determination would have required the Benefits Review Board to vacate the award in Mrs. Santoro's favor. Mere confession of doubt as to the accuracy of both experts' rejection of this explanation for "causality" had, however, exactly the opposite effect. Doubt of the correctness of joint testimony was not just sufficient to make "conflicting" testimony "equally probative" it was enough for the Board to conclude that the award of benefits had been based upon "substantial evidence". In addition, the Benefits Review Board established what must be shown upon Longshore Act Section 21 review in order to avoid liability for benefits in a doubt rule case where the Section 20(a) presumption has been rebutted. In his decision and order awarding benefits the ALJ held that "[b]efore Section 20(a) is applicable, a claimant must establish that he or she sustained some harm, and that working conditions existed or that an

accident occurred that *could have* caused the harm " (A-30, emphasis added), an alleged obligation of the benefits claimant mis-characterized by the court of appeals as necessary "to establish a *prima facie* case" (992 F.2d 1279-80). After observing that the Section 20(a) presumption had been successfully invoked and rebutted, the Benefits Review Board affirmed: "Because the employer has failed to establish that the Administrative Law Judge's crediting (*sic*)" of claimant's doctor's opinion "is inherently incredible or patently unreasonable" (A-23). This showing is, of course, *identical* to what would be required—assuming that any evidence is needed for the Section 20(a) presumption to be invoked—in order to *deny* invocation, i.e., that the proof supporting entitlement to benefits was so infirm as to fail to establish even that the harm at issue "could have" been caused by work-related injury. Although neither petitioner says so, this means if the "true doubt rule" is valid, doubt is Longshore Act Section 21 "substantial evidence". Of course, the doubt rule shifts the burden of persuasion and with that the risk of non-persuasion to the Longshore Act employer, but to persuade the fact-finder of what? In Mrs. Santoro's case respondent was required to prove beyond doubt there was no *possible* connection between injury and subsequent disability and death. Despite the fact that there is, of course, no rational connection between Longshore Act employment and aggravation of cervical spinal cord cancer (see, *Mobile, J&K.C.R. Co. v. Turnipseed*, 219 U.S. 35 (1910)), respondent was found liable for benefits because the riddle of deceased's cancer has not been solved. As a result, the Section 20(a) presumption was *not rebuttable*. It is to *this* "interpretation" of the Longshore Act to which the government would have this Court "defer". There is no question at all that it is a result which the *actual* "any" and "all" doubt rule permits. Because the Solicitor seeks to have Mrs. Santoro's award restored, it is *this* rule, which allows "selection" of a "set of facts" favoring claimant as the Review Board held in *Greenwich Colleries* (19a, n. 3), which the Agency sponsors.

ARGUMENT

The sole issue raised by the petitions is how facts are to be found at administrative hearings of Longshore and Black Lung Benefits Act claims. Issues of what might be called "substantive" law, of course, also apply. Mrs. Santoro's award offers an example of a finding of fact insufficient to establish entitlement to benefits: that the record "establish[ed] and unbroken claim of events supporting a finding of causally-related neck pain" (A-44). It is not pain but ". . . incapacity because of injury to earn the wages which the employee was earning at the time of injury in the same or other employment" (Section 2(10)) which triggers the obligation to pay benefits in the event that the connection between "disability or death" which ". . . results from an injury" (Section 3(a)) is proven to be an ". . . accidental injury or death arising out of and in the course of employment . . ." (Section 2(2)). It has been, however, held to be enough to establish a right to benefits to show that an employment injury aggravates, accelerates or combines with a pre-existing condition (see, e.g., *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)); and supervening cause is said to bar Longshore Act benefit claims only if having an "overpowering and nullifying effect" (*Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898 (5th Cir. 1981)), examples of how the law has been structured in way favorable to claimants beginning with this Court's decision in *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932). Such "humanitarian" interpretations of the Longshore Act concerning what need be proven as opposed to how all necessary facts must be established are not affected as a result of the court of appeals' decision in Mrs. Santoro's case.

THE ORIGINS AND ERROR OF THE DOUBT RULE

The first "true doubt rule" decision according to the Solicitor is *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932), a case involving issue of "accidental injury" and "arising out of and in the course of employment" in which it was said: "Where there is doubt, it should be resolved in favor of the injured employee or his dependent family"; *and* that "[i]n this case the facts are all agreed". The second is *Southern S.S. Co. v. Norton*, 101 F.2d 825, 827 (3rd Cir. 1939) which involved interpretation of Longshore Act Section (2)(10) "disability", a question characterized by the court of appeals as "one of law" in which the court held that "it was quite apparent from the record" that claimant had proved his entitlement to benefits. In the Solicitor's next doubt rule case, *Southern Pacific Co. v. Sheppeard*, 112 F.2d 147, 148 (5th Cir. 1940), which involved death as a result of assault by a co-worker, the court of appeals held "the evidence is not in dispute". In *F.H. McGraw & Co. v. Lowe*, 145 F.2d 886, 888 (2nd Cir. 1944), the last of the Solicitor's cases prior to APA adoption, which involved Parkinson's disease allegedly caused by trauma, "one expert neurologist gave testimony that such . . . causal relationship existed"; and as a result the court concluded that it could not say that "the deputy commissioner did not base his finding of causal relationship . . . upon the evidence submitted". There is, in fact, *no* case in which any rule of doubt was held applicable to Longshore Act factfinding prior to enactment of the Procedures Act; and the Solicitor's claim that it was "firmly established as a rule of construction under the . . . [Longshore Act] . . . when the APA was enacted" is refuted by the government's authority itself. Omitted from argument in both petitions is citation to cases decided after adoption of the Administrative Procedures Act holding that the Longshore Act claimant had the "burden of proof" in the sense of risk of non-persuasion. See, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Gooding v. Willard*, 209 F.2d 913 (2nd Cir. 1954); *Eschbach v.*

Contractors, Pacific Naval Air Bases, 181 F.2d 860 (7th Cir. 1950).

The first case in which it was held that a doubt rule applies to Longshore Act factfinding is *Young & Company v. Shea*, 397 F.2d 185 (5th Cir. 1968). This holding and every other thereafter contradicts the Longshore Act factfinder's duty of ". . . initially selecting the inference which seems most reasonable . . ." established in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947), a case decided after APA enactment but which involved a benefits claim arising before that time, since the doubt rule allows benefits to be awarded unless the ALJ is certain they should be denied. In addition, the rule, which according to the Benefits Review Board in Mrs. Santoro's case "comes into play" only after the Act Section 20(a) presumption is rebutted (A-21), requires the employer to "insure conviction", i.e., abolish doubt, that benefits are *not* owed. In *DelVecchio v. Bowers*, 296 U.S. 280 (1935), this Court held that the Longshore Act Section 20(d) presumption, "[t]hat the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another", is not evidence; and as a result an employer need not offer proof in rebuttal sufficient to "induce conviction" that the fact presumed is not so, a holding which rejects the same biased result which the doubt rule achieves. In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 at 612 n.5 (1982) "coverage" of the Longshore Act Section 20(a) presumption was said to be "debateable" but also that it "seems fair to assume" that it is "of the same nature as the presumption created by Section 20(d) . . . as construed in *DelVecchio v. Bowers* . . . and the presumption defined in Rule 301 of the Federal Rules of Evidence"; and in order that entitlement to benefits not be mistakenly treated as disability and life insurance, this Court held that Longshore Act Sections 3(a) and 2(2) "work connection" had to be "proved". *Ibid.* at 615 n.10. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-478 (1951), the Court held that the

Procedures Act had been adopted by Congress to discourage "the notion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself", *exactly* what in *Greenwich Collieries* the ALJ did in considering but not deciding whether there was X-ray evidence of pneumoconiosis. Moreover, it is the identical approach which Mrs. Santoro urges by claiming that "the true doubt rule must be seen as a component of the substantial evidence rule" (Pet., p. 7). In addition, the justification for the doubt rule was initially said in *Young & Company v. Shea* to be existing case law; and in denying rehearing the court *en banc* additionally relied for its holding that the Longshore Act factfinding "standard is less" upon the alleged fact that "Congress has indicated an intention to require less", a conclusion for which only "33 U.S.C. Section 901 *et seq.*" was cited (404 F.2d at 1061 n.2).

In *Young & Company v. Shea*, *supra*, 397 F.2d at 188, the fifth circuit recited the doubt rule as expressed in *Fidelity & Casualty Co. v. Burris*, *supra*, without citing that case but others, in no one of which doubt was applied to the process of finding facts. It did so despite holding: "Under 33 U.S.C. Section 903(a) the claimant has the burden of proving all that is not presumed under section 920", thus establishing that the "true doubt rule" began not as a reallocation device but as a lessened standard applicable to claimant's proof. Because *Young & Company* involved question of collateral estoppel on account of a jury finding that claimant had sustained no injury, the court observed first that the "standard [of proof] before the jury is the preponderance-of-credible-evidence test" and next that "[a]lthough we cannot ascribe a legal label to the burden before the . . . [Longshore Act factfinder] . . . the statutory policy, *as interpreted by the courts*, indicates that it is a less stringent standard of persuasion" (*Ibid.* emphasis added). The absence, in fact, of a prior case establishing a rule of doubt applicable to finding facts in Longshore Act benefit claims proves that the doubt rule based upon "statu-

tory policy, as interpreted by the courts" was a mistake when originated—no such "policy" had ever before been found to control the process of finding fact.

More importantly, the holding that there is a "less stringent standard of persuasion" contradicts this Court's definition of what constitutes "substantial evidence". In *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, at 652 (5th Cir. 1968) the court of appeals held by quotation from *NLRB v. Columbian Enameling and Stamping Co., supra*, 306 U.S. at 299-300 that substantial evidence ". . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury"; and its excerpt omitted this Court's first definitional phrase: "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established". This preliminary requirement, since "suspicion" is a source of doubt, proves that any rule of doubt had been rejected by this Court not later than nearly thirty years before its invention. In denying joint rehearing of *Watson v. Gulf Stevedore Corp.* and *Young & Co. v. Shea* (404 F.2d 1059) it was observed correctly that in a Longshore Act case ". . . the reviewing court applies the same rule to review the administrative proceedings that an appellate court applies in review of jury verdicts and in this respect . . . the scope of review of jury verdicts and of administrative findings is the same" (404 F.2d at 1061); and the court held, also correctly, that adoption of the Administrative Procedures Act ". . . did not change the scope of judicial review . . ." of Longshore Act factfinding (*Ibid.*). But it also decided that in reviewing the factfinder's decision ". . . the . . . court must take into account that the standard of persuasion is less . . . than it would be in a jury trial on the same issue" and, contradictorily, that "[n]othing said . . . [in *Young & Company v. Shea*] . . . intimates any modification of the substantial evidence rule . . . applied to the question . . . whether the . . . determination [to award benefits] should be accepted on review" (*Id.*).

Obviously, the question what constitutes substantial evidence is a matter of what the party with the burden of persuasion need prove in addition to how he or she may prove it. How all necessary facts must be established was fixed in *NLRB v. Columbian Enameling and Stamping Co.* and it is by evidence sufficient to justify in an ordinary case a civil jury verdict. This means that the trial judge in refusing to direct a verdict at the close of all proof has determined that the jury is entitled to decide the issues by the standard of the preponderance of the credible evidence—which the court thereafter charges must be the basis of its verdict—in favor of the party having the risk of non-persuasion. Since this jury trial test must be applied before the evidence upon which an award of benefits can be found to be "substantial", the proof standard by the preponderance of the credible evidence *must* apply to findings of fact. Creation of a "less stringent standard" applicable to factfinding, one less than the preponderance of the credible evidence although how much less the court of appeals could not say, *inevitably* affects the standard of review as this Court has defined it—if the evidence at the Section 19(d) hearing is less and as a result *would* justify direction of a verdict, i.e., would not, if believed, establish the claim by the preponderance of the evidence, what does the Benefits Review Board or the courts of appeals review for? It cannot be substantial evidence, i.e., proof which depending upon determinations of credibility and accuracy may properly be found to be preponderant, because the claimant need not offer such proof before benefits may be awarded. Review must therefore be only to determine whether evidence which need not have convinced was "inherently incredible or patently unreasonable" which, of course, is what the Board in Mrs. Santoro's case said it was. This means, in turn, that *neither* the ALJ *nor* the reviewing Board or court need determine whether the evidence is ". . . enough to justify, if the trial were to a jury, a refusal to direct a verdict . . ." In Longshore Act factfinding, it is not just the Administrative Procedures Act which is the "polestar which guides our course" to the

conclusion that facts essential to an award of benefits must be found by the preponderance of evidence (992 F.2d at 1285), it is, in addition, this Court's *NLRB v. Columbian Enameling and Stamping Co.* substantial evidence definition.

The doubt rule/substantial evidence contradiction is apparent in subsequent cases in which Longshore Act benefit awards were affirmed when the testimony concerning work connection was only a "possibility" that it "could have" caused the harm for which benefits were sought. *NLRB v. Columbian Enameling and Stamping Co.* would not, of course, allow an award of benefits based upon testimony of a possibility that disability and/or death arose out of and in the course of employment. In any jury trial evidence that is as consistent with a hypothesis that, for example, the defendant is negligent and with one that it is not, is proof which tends to prove neither. *Gunning v. Cooley*, 281 U.S. 90, 95 (1930)[4]. When a number of things may have brought about, again for example, an injury, for some which the defendant is liable and for some which it is not, it is not for the jury to guess in order to find that, for further example, the negligence of the defendant was the real cause. *Patton v. Texas P.R. Co.*, 179 U.S. 658, 663 (1901). This is because a verdict resting on speculation or conjecture cannot stand. *New York C.R. Co. v. Ambrose*, 280 U.S. 486, 490, 491 (1930). For this reason, in *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) the Section 20(a) presumption, which exists "in the absence of substantial evidence to the contrary", was held not to have been rebutted on account of the fact that the employer's proof was *not* substantial evidence because its medical expert "did *not* testify in any way as to . . . probability". The doubt rule "less stringent standard", however, allows speculation to support an award: It is sufficient if "it . . . [is] . . . possible" that working conditions were enough to "contribute" to the cause in fact of disability. See, *Noble Drilling Co. v. Drake*,

[4] Cited in *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. at 300.

supra, 795 F.2d at 480, in which that court affirmed a benefits award based upon doubt although it *acknowledged* it was ". . . satisfied that the claimant did not establish causation by preponderance of the evidence". Since proof of a possibility is not "substantial evidence", although the Fifth Circuit Court of Appeals insists that the fact finding and review standards are different, its undefined "less stringent standard" ensures that there is no standard of factfinding and, hence, of review.

Mrs. Santoro's case shows that it was the Section 20(a) presumption which was the basis of the benefits award despite the court of appeals' holding that ". . . the ALJ did not make use of the presumption in this case" (992 F.2d at 1280 n.2) and that effort to justify the doubt rule, as *Noble Drilling Co. v. Drake* also reflects, requires treating the presumption as the claimant's *prima facie* case. This demonstrates that the courts of appeals and the Benefits Review Board in applying the doubt rule mistake what a Longshore Act claimant need prove as well as how he or she need prove it. It has been said that a *prima facie* case ". . . consists of sufficient evidence *in that type of case* to get plaintiff past a motion for a directed verdict in a jury case" and: "It is the evidence necessary to require a defendant to proceed with his case". *White v. Abrams*, 495 F.2d 724, 729 (9th Cir. 1974). These definitions are not, however, equivalent when a presumption is involved. Assuming evidence is necessary to invoke the Section 20(a) presumption and that this need be only that work connection is possible, that evidence, once the presumption is rebutted, must fall out of the case if the presumption itself does. Moreover, it is because of the presumption's existence and *not* on account of the fact that claimant has presented "sufficient evidence *in that type of case* [i.e., a claim for benefits pursuant to the Act's Section 3(a) and 2(2)] to get . . . [claimant] . . . past a motion for a directed verdict in a jury case" that the employer must proceed, unless proof triggering the presumption is not just evidence after rebuttal it satisfies the substantive law requirement of what need be proved. In Mrs.

Santoro's case, this was whether her late husband's injury at work had, *in fact*, contributed to his subsequent disability and death, not that this was *possible*. Nonetheless, the court of appeals held that a Longshore Act *prima facie* case requires proof sufficient to invoke the presumption, failure of which "defeats the claim" (992 F.2d at 1279), although mere filing of claim may invoke it. In *DelVecchio v. Bowers*, *supra*, 296 U.S. at 286 this Court held that the "only office" of Section 20(d) presumption was to "control the result where there is an entire lack of competent evidence"; that "[i]t never had and cannot acquire the attribute of evidence in the claimant's favor"; and "[o]nce the employer has carried his burden of offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case". Since in Mrs. Santoro's case it was said by the Benefits Review Board that it was after the Longshore Act Section 20(a) presumption was invoked and rebutted that the "true doubt rule comes into play" (A-21), the rule requires that proof in opposition to an award of benefits "induce conviction" that benefits are not owed, exactly the view that "presumptions are evidence" rejected in *DelVecchio v. Bowers*. Since *DelVecchio v. Bowers*, held that "substantial evidence" as used in Longshore Act Section 20 need only be "sufficient to justify a contrary conclusion" and *U.S. Industries/Federal Sheet Metals, Inc.*, *supra*, holds that the work connection has to be "proved", it is not possible to read either case as other than *rejecting* the "true doubt rule". In Mrs. Santoro's case doubt nonetheless substituted for her witness' "edema theory"; and evidence said to have triggered the presumption was *not*, in fact, the basis of the award. For this reason had the presumption truly "fallen out" Mrs. Santoro would have been denied benefits. The Administrative Law Judge, in fact, rejected claim that her husband's disability and death "could have" been caused *for the reason asserted*. In *U.S. Industries/Federal Sheet Metals, Inc.* this Court held that the Longshore Act Section 20(a) presumption does not apply to claims not made, and not only did Mrs. Santoro not claim her husband's disease was caused to

increase in level of malignancy by reason of injury, she denied it. More importantly, mistaking the presumption for a "*prima facie* case" and evidence triggering it for proof sufficient to establish entitlement to benefits, together with a rule of doubt thereafter applicable, means that the presumption *always* controls the result, not "in absence of any proof" or when the proof is in "equipoise", but despite whatever proof if offered by a Longshore Act employer.

Of course, how proof, if any is required, sufficient to invoke the Section 20(a) presumption became confused with what a Longshore Act claimant need prove can be adequately explained only by the enduring character of the mistaken view that presumptions are evidence[5]. The true doubt rule has been said to ". . . ensure that the employer will win . . . only when its evidence is *stronger* than the claimant's" (*Mullins Coal Co. v. Director, OWCP, supra*, 484 U.S. at 144 n.12, precisely what a presumption which is justified by a rational connection can be made to achieve, but which this Court has held the Section 20(d) presumption does not. Surely, were there an intended bias in Longshore Act factfinding Congress would not have provided "in the absence of substantial evidence to the contrary" in Section 20. Instead, it would have required more. Of course, that presumptions are or ought to be evidence, i.e., should influence the result after rebuttal, is a mistake of ancient lineage. See, Weinstein's *Evidence* (Vol. 1, Rules 101-403, Section 300[01] pp. 300-1 to 5 (1989). This view of the effect of presumptions was, however, rejected by Congress in enacting the Federal Rules of Evidence (Pub. L. 93-595, January 2, 1975, 88 Stat. 1931). *Ibid*, Section 301[01] pp. 301-1 to 12, 37.

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[5] Assisted by the practice of treating Benefits Review Board decisions as authority. See, *Noble Drilling v. Drake, supra*, 795 F.2d at 481. In U.S. Industries/Federal Sheet Metal, Inc. (455 U.S. at 615-16) this Court held that the presumption refers to "[a] prima facie 'claim for compensation' " and that it is "no substitute for the allegations necessary to state a prima facie case."

In *Noble Drilling Co. v. Drake, supra*, the Court held that the doubt rule is properly based upon ". . . broad general principles . . ." (795 F.2d at 482) but it nonetheless *must be* based upon some Longshore Act provision. The starting point in construing a statute is the language of the statute itself. *Consumer Products Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); and the same word or phrase used in a statute more than once ordinarily should be given the same meaning. See, e.g., *Barnson v. U.S.*, 816 F.2d 549, 554 (10th Cir. 1987). Legislative "purpose" no less than legislative history divorced from statutory text is meaningless. *Lincoln v. Virgil*, ____ U.S. ____, 113 S.Ct. 2024, 2031-32 (1993). If substantial evidence has the same meaning in both Sections 20 and 21 proper construction requires that the Longshore Act be found to contain no bias in favor of finding facts supporting compensability. As this Court has held by rejecting the view that evidence rebutting a Section 20 presumption need "induce conviction" and, instead, deciding that it need only justify a contrary conclusion, and defining substantial evidence sufficient to support an award of benefits upon review in exactly the same terms, the "true doubt rule" contradicts Longshore Act Sections 20 and 21. Of course, since agency right to allocate achieves the same result rejected in *DelVecchio v. Bowers*, the government's claim of deference means that the Secretary of Labor may overrule the Supreme Court of the United States.

CONCLUSION

How despite massive Supreme Court precedent abolishing all possibility of a doubt rule applicable in administrative hearings it can be said that this Court, in *Mullins Coal v. Director, OWCP, supra*, "ducked" this only alleged issue (see, *Freeman United Coal Mining Co. v. Director, OWCP*, 999 F.2d 291, 293 (7th Cir. 1993, statement of Esterbrook, J.) is impossible to understand. In *Mullins Coal*, this Court

observed that the doubt rule meant "stronger employer evidence was required "on invocation and rebuttal" (484 U.S. 144 n.12). It rejected use of the rule on invocation and had no reason to decide whether it applied to rebuttal since mooted by Black Lung Act regulation, the effect of which putting the burden of persuasion on the employer not being disputed. Of course, since the rule applies to "all" doubts on "an" issue, to reject it once is to reject it *always*. It is, thus, awkward, surely, for members of that court to express the view that this Court must now "supply the cure" for an ailment which the courts of appeals created. Nonetheless, every consideration important to determining whether a writ of certiorari should issue exists in *Maher Terminals, Inc. v. Director, OWCP*, despite the fact that the decision of the Third Circuit Court of Appeals is correct. The retreat from the requirement of reasoned analysis which the "true doubt rule" reflects demonstrates that what is at risk is not less than the adversarial system of fact finding. An important justification for it seems to be concern for administrative economy, despite the fact that under both the Longshore and Black Lung Act claim frequently could not be more effectively promoted than by making a doubt rule applicable to the fact finding process. What this inappropriate argument also establishes is how unfair the rule is, especially to Longshore Act employers. In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 261 n.9 (1979) this Court held that Congress in amending the Longshore Act in 1972 "made a determined effort to narrow the gap" between benefits and damages. The District of Columbia rejected the amended Act as its compensation statute because its expense made business in the District "non-competitive". *Hughes v. Dist. of Col. Greater Wash. Labor Council*, 498 A.2d 567, 569-70 (D.C. 1985). This Court has held that the 1972 Longshore Act amendments[6], since the result of compromise, are *not* remedial. *Morrison-Knudsen Const. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983). As

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[6] Pub. L. 92-576, October 27, 1972, 86 Stat. 1251.

of the time of filing of this Brief respondent will have paid compensation benefits amounting to $326,858 as a result of Mrs. Santoro's claim, no part of which is recoverable from her in the event respondent should ultimately prevail. See, Longshore Act section 21(b)(3) and (c).

DATED: New York, New York
December 10, 1993

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APPENDIX

DIRECT TESTIMONY OF DR. YAZDAN
(Hearing Transcript, pages 50-51)

A (Continued):

So he had a mixture of symptoms which were all precipitated one way or another by this accident.

Now, we are not saying that it was caused by the accident, so that's where the controversy is. You know, people think when somebody is saying about their spondylosis or the astrocytoma was caused by trauma. Well, that's not true. We know that's not true. Trauma does not cause neoplasm, any kind of neoplasm, we know that.

(pause)

Trauma, on one shot deal doesn't even cause a spondylosis. Although in multiple trauma and grinding does cause that.

However, go back in—go back to astrocytoma. This tumor or this lesion initially was dormant there and he might have gone another 15 or 20 years before he would become symptomatic.

(pause)

But this injury expedited the whole situation.

Q In other words, doctor, if I understand you correctly, the injury did not cause the tumor to grow.

A No.

Q It did cause edema, apparently.

A Yes, yes.

(pause)

Q And it was the edema within the limited opening.

A Yeah.

Q What do you call that, parameter, doctor?

A Limited opening, yeah, a space, yeah.

Q Limited space, which caused the symptomatology. Now what symptomatology are we talking about?

A We're talking about the second group of symptomatology which leads to the partial paralysis, sensory deficit and those things involving the extremities.

Neck pain and other things that he had, that was related to the—that was a direct result of the sprain and a strain of every past injury that he had.

(pause)

De—development of the paralysis was the result of the gradual swelling around the tumor within the cord.

* * *

Q I'm sorry. Was that the cause, doctor, of the paralysis to the left side of the body followed by the right side of the body?

A That's correct.

CROSS-EXAMINATION OF DR. YAZDAN
(Hearing Transcript, pages 133-34)

Q Now, that edema caused, according to you, pressure on the cord which was translated into neurological-type complaints and in the findings.

A Now you're introducing the spinal cord.

In order for you to understand that, you have got to imagine or visualize the anatomy of the neck of this particular patient, not any patient. This particular patient's cord was already slightly bigger. Listen to this.

His cord, diameter, was a slightly bigger than an ordinary individual without a tumor.

In other words, the space between this bony canal and the cord was diminished already. Therefore, even a minor sprain may put this guy in trouble because there is not enough room in there for the cord to maneuver.

Therefore, as an immediate reaction, you get the muscular response. Delayed reaction, because the patient keeps moving the neck in the subsequent several weeks, you will get further, further trauma, more and more trauma to the cord and which eventually leads to further edema within the cord.

No, none of these things makes the tumor bigger or increases their cell growth or anything else, or create a tumor.

But yes, trauma does create edema at different time at different level depending how the patient, where the edema is, what tissue is involved and how the patient is treating it. If it's not diagnosed, the patient keeps moving constantly, he keeps—

Q And that's—

A—traumatizing it, therefore, it's going to get worse, you see?

* * *

Q Doctor, in fact, you're saying something quite different, are you not? You're saying now that the sprain caused, even though it may have been slight, direct mechanical contact

between the bony canal and the tissue comprising the spinal cord.

A It's not different. I mentioned it, maybe in different—

Q You're talking—

A—terms, but—

Q You're talking about something that, according to your theory just now expressed—

* * *

HEARING TRANSCRIPT
(Pages 142-144)

Q The incident caused something to happen here on the shoulders or—or the neck or altogether.

A Both, both.

* * *

Q That did what?

A That did cause several things.

Number one, it causes permanent strain of the muscles.

Q All right.

A Number two, it causes swelling around the spine itself with the ligaments, which—which is arthritic and that causes severe pain.

Number three, began to rub against the cord or the dura, which is covering the cord.

Q Right.

A And in the beginning, this was not apparently enough to cause immediate neurological picture, but it just caused pain. But with the frequent trauma day after day after day, he gradually got worse and worse and worse and worse, until he wound up in the emergency room.

Nobody could explain how a simple cervical sprain could lift—could lead to this kind of a picture. Until we found out what happened, then we tried to put everything together and that's what I'm trying to do, put them together.

* * *

Q You're saying that there was mechanical contact between the cord or cord tissue and the dura—

A And the spinal canal.

Q —and the spinal canal—

A Yes.

Q —with the result of the development within the canal of edema.

A Edema around the tumor because you had a dormant tumor there which was silent. When you have a silent problem

where there is osteoarthritis or whether it's a tumor or whether it's a cyst, whatever; that area, the tissue surrounding the lesions more suspectable of developing edema than the rest of the body.

The trauma of this magnitude, which was not very severe, is not enough to cause a swelling in the cord and myelopathy.

However, if you have some pre-existing condition in the cord, then you have this trauma on top of it, yes; if it leads to a trauma on a crescendo fashion.

(pause)

(Transcript page 166)

Q Doctor.

A Yes.

Q The mechanics, according to this now-expressed explanation is again swelling, it's swelling within the cord.

A Yes.

Q Is that what you're saying?

A Around the lesion, which happened—which turned out to be astrocytoma.

Q Now, are you saying that—

A But it happened in—

Q —that swelling around the cord, this edema around—within the cord, within the cord itself—

A Yes.

Q —around the tumor—

A Yes.

Q —that that was the result of these consecutive traumas, beginning with the sprain of the neck on July 23rd, 1985?

(No response)

And following that—

A It's—

Q —in the course of ordinary use of the head and neck?

A Yes, yes.

* * *

Q You're saying that the rub, rub, rub of—

A The spinal cord.

Q —cord tissue—

A Yes.

Q —yes, the bony canal, in the period of time between July 23rd, 1985 and for example August 7th, 1985 caused swelling within the cord around the tumor which in turn caused the appearance of symptoms and signs of neurological dysfunction.

A That's right.

* * *

(at page 171)

Q Have a little patience with me doctor.

In fact, that this cancer—

A All right.

Q —this tragic cancer, this incurable cancer simply overtook—tragically overtook Michael—Michael Santoro?

(pause)

A I think that—

Q Is that a valid alternative—

A —no, no, No. it's not valid, no, no.

Q —explanation of the whole picture?

A No, it's not valid for the following reason:

Number one, you cannot refer to astrocytoma as cancer. For the following reason: cancer, in general, means anaplastic tissue in the body which spreads and kills the patient.

Astrocytomas of the brain and the spinal cord do not spread, the grow in situ, in place.

* * *

(At page 191)

(Answer continued)—that this gentleman had this tumor the same size, practically, before this accident and he wasn't symptomatic. How do you explain that?

Q A tumor of this kind, if the man is fortunate enough to live long enough and depending on how aggressive it is and it can be anything from weeks to months to years will at some point in time—

A Yes, at some point in time, will get—

Q —in—in God's due time, cause symptoms, is that not so?

A Eventually, yes.

(pause)

Q You say—

A Oh no, me? I never said that.

Q You say that that tumor, this tumor described by you in your operative report on August 19th, as it's been described

in this record, would've co-existed for 15 to 20 years without causing symptoms but for the fact that some alleged sprain of the neck occurred July 23rd, 1985.

(pause)

That's your testimony, isn't it, sir?

A Yes.

TESTIMONY OF DR. DERBY
(Hearing Transcript page 257)

Q Now, doctor, what is astrocytoma?

A An astrocyte is a type of cell in the central nervous system which serves as support and maintenance to the other cells which do the business. Those are the neurons and the neurons have long fibers coming out from them that run to wherever they're going to go and in the central nervous system the astrocytes provide some structure, so this whole complex of neurons and white matter and also nourish the cells and the fibers.

* * *

(at page 258)

Q Is astrocytoma curable?

A No. We manage it but we cannot cure it.

Q Is it a form of cancer?

A Yes, in lay terms it is cancer.

* * *

(at page 259)

Q Now the operative report first, doctor, would you tell us what of significance to you is reflected in the report of the operation.

A That this was a highly malignant astrocytoma centering on the third and fourth cervical segments but in fact in totality extending as high as the upper end of the laminectomy at the base of the skull and extending as low down as the lower end of the laminectomy at C-7, meaning that this tumor ran from the upper most spinal cord with its connection to the medulla, down through the entire cervical segments, all eight of them and into the upper thoracic cord.

The character of the tumor at its central portion described by Dr. Yazdan as a mushroom consisted of a thin out, fluctuant, soft area which was not a cyst and this was by definition a necrotic area. Necrosis which is tissue death was occurring within the tumor itself and this is a categoric finding in the most malignant, the most aggressive kind of astrocytoma.

11 AM

REPORT OF OPERATION

NAME SANTORO, MICHAEL

SURGEON(S) DR. YAZDAN

* * *

PREOPERATIVE DIAGNOSIS	QUADRIPLEGIA SECONDARY TO CERVICAL MYELOPATHY SECONDARY TO INTERMEDULLARY (sic) LESION.
POSTOPERATIVE DIAGNOSIS	INTERMEDULLARY LESION OCCUPYING SEVERAL SEGMENTS OF THE SPINAL CORD PREDOMINATELY AT C3-C4 WHICH APPEARED TO BE MALIGNANT LOOKING.
NAME OF OPERATION	DIFFUSE WIDE CERVICAL LAMINECTOMY. INTRADURAL EXPLORATION. MITRAL DISSECTION OF THE TUMOR AND PARTIAL RESECTION.

PROCEDURE: The patient was taken to the Operating Room on 8/19/85 where under satisfactory general endotracheal anesthesia, he was placed in prone laminectomy position leaning on two chest rolls and the head resting on a horseshoe cerebellar head rest . . . Following completed hemostasis, laminectomy was started from C2 to T1, and following unroofing of the canal, the laminectomy itself was widened to the articular facet region. It was readily noted that the dura was somewhat wider than (sic) C3-C4 area . . . Exploration was started with 6 power magnification which readily identified the area and the extramedullary portion of the intradural space was negative throughout except for spondylotic changes which were readily noticeable with a protrusion of most disc spaces. However, the prominent feature of the area was the mushroom deformity from back part of the cord to C3

and C4 which had totally destroyed normal anatomical feature of the spinal cord and the cord was extremely wide in this region. The top of the mushroom areas were quite thin and fluctuant . . . Further exploration showed that the tumor was extending deep in the cord and was extending upward more than downward. Further removal of tumor was done and initial frozen section report was inconclusive. However, several more pieces were sent and it was evident that even under 10 power magnification, that there was no line of demarcation between this lesion and, the tumor and the cord. Therefore the operation was terminated . . . .

/s/ _____
DAVID YAZDAN, M.D.
mc
D 8/21/85 T 8/21/85